89-364

No. _____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC POWER & LIGHT COMPANY, et al.,
*Petitioners,*

v.

MONTANA DEPARTMENT OF REVENUE, et al.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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## QUESTIONS PRESENTED

May Montana taxing authorities constitutionally impose beneficial-use property taxes on —

1. the Montana Intertie, a federal electric power transmission facility of 500 kilovolts ("kV"), which facility is designed and operated to transmit large blocks of power in interstate commerce, but at the same time exempt from such taxes lower-voltage federal transmission facilities designed and used to transmit lesser amounts of power over shorter distances?
2. interstate utilities for their alleged "use" of federal high-voltage transmission facilities, but at the same time exempt from such taxation intrastate rural electric cooperatives that admittedly "use" such federal facilities?
3. those it has determined to be users of federal electric power transmission facilities, but at the same time exempt users of facilities owned by the State of Montana from such beneficial-use taxes?
4. five interstate utilities for their alleged "use" of the Montana Intertie, notwithstanding (1) that the utilities do not own, possess, or control the Montana Intertie; (2) that BPA transmits power for the utilities over the Montana Intertie pursuant to express congressional direction; and (3) that Congress authorized, and the taxing authorities have collected, federal "impact aid" payments consequent to the construction and operation of the Montana Intertie?

## PARTIES BELOW AND RULE 28.1 LISTING OF AFFILIATES

Plaintiffs below were Pacific Power & Light Company,[1] Portland General Electric Company,[2] Puget Sound Power & Light Company,[3] The Washington Water Power Company,[4] and the Montana Power Company.[5] Defendants below, in addition to the Montana Department of Revenue, were: Jefferson County; Susan Miller, Treasurer of Jefferson County; Broadwater County; Irene Kemmer, Treasurer of Broadwater County; Powell County; Dalice M. Cook, Treasurer of Powell County; Granite County; Harriet L. Ryan, Treasurer of Granite County; Missoula County; Fern Hart, Treasurer of Missoula County; Mineral County; Billye Ann Bricker, Treasurer of Mineral County; Sanders County; June M. Thayer, Treasurer of Sanders County; and Ed Argenbright, Superintendent of Public Instruction. All of the defendants were represented by counsel for the Montana Department of Revenue.

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[1]Pacific Power & Light Company is an assumed business name for a portion of the electric utility operations of PacifiCorp, an Oregon corporation. The remainder of PacifiCorp's electric utility operations are carried out under the assumed business name of Utah Power & Light Company. Pacific is affiliated with the following direct or indirect subisidiaries that are not wholly owned by PacifiCorp: Eye Dentify, Inc.; Equitec Financial Group, Inc.; Flight Dynamics, Inc.; Arnov Systems, Inc.; NERCO, Inc.; Kamcom Mines, Ltd; Rycon Mines, Ltd.; Ryan Mines, Ltd.; Vol Mines, Ltd.; Black Lake Pipe Line Company; Security Offshore Insurance, Ltd.; Pacific Telecom, Inc.; International Satellite, Inc.; Pacific Satellite, Inc.; FTC Communications, Inc.; Pacific Telecom Cable; PetroCom; Catalina Marketing; Microrim, Telecom Plus International; and Marathon Financial Associates, Inc.

[2]Portland General Electric Company, an Oregon corporation, is a wholly owned subsidiary of Portland General Corporation, an Oregon corporation. Other wholly owned subsidiaries of Portland General Corporation are Miracle Mine Operations, Inc. and Portland General Holdings, Inc. All of the following enterprises are affiliated with Portland General Electric Company as direct or indirect subsidiaries of Portland General Holdings, Inc.: Portland General Energy Systems, Inc.; Portland General Exchange, Inc.; World Trade Center Northwest Corporation; Portland General Financial Services, Inc.; Columbia-Willamette Development Company; Columbia-Willamette Investment Company; Portland General Leasing, Inc.; Columbia-Willamette Leasing, Inc.; Cornerstone Columbia Development Company; FFP, Inc.; and Frontier First Partners; Rail Leasing, Inc.

[3]Puget Sound Power & Light Company, a Washington corporation, is affiliated with only one direct or indirect subsidiary that is not wholly owned — North American Energy Services Company, a Washington corporation.

[4]The Washington Water Power Company, a Washington corporation, has only direct subsidiaries that are wholly owned. The only indirect subsidiary corporation that is not 100 percent-owned is the Limestone Company, Inc.

[5]The Montana Power Company, a Montana corporation, is affiliated with a number of direct subsidiaries, but all are wholly owned. The only indirect subsidiary corporation that is not 100 percent-owned is Intermountain Digital Network, Inc.

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Pacific Power & Light Company, Portland General Electric Company, Puget Sound Power & Light Company, The Washington Water Power Company, and the Montana Power Company petition this Court for a writ of certiorari to the Montana Supreme Court to review the opinion in *Pacific Power & Light Company v. Montana Department of Revenue*, ___ Mont. ___, 773 P.2d 1176 (1989).

## OPINIONS BELOW

The order of the District Court for Lewis and Clark County, Montana, is unreported and is reprinted in the Appendix. The opinion of the Montana Supreme Court is reported at ___ Mont. ___, 773 P.2d 1176 (1989), and is also reprinted in the Appendix. A timely petition for rehearing was filed, which petition was denied on June 1, 1989. A related challenge to beneficial-use taxes involving only Portland General Electric Company and different federal 500-kV transmission facilities was also upheld by an order of the District Court for Lewis and Clark County, Montana. That unreported decision is reprinted in the Appendix. The trial court's order in the latter case was also affirmed by the Montana Supreme Court, *Portland General Electric Company v. Montana Department of Revenue*, ___ Mont. ___, 773 P.2d 1189 (1989) *("Portland General")*, and is reprinted in the appendix. A timely petition for certiorari in *Portland General* was filed with this Court on August 7, 1989.

## JURISDICTION

The Opinion of the Montana Supreme Court was issued on April 17, 1989. Because the petition for rehearing was denied on June 1, 1989, under United States Supreme Court Rule 20.2 and 28 U.S.C. § 2101(c) (1982), a petition for certiorari is due on August 30, 1989. Jurisdiction rests on 28 U.S.C. § 1257 (1982), as amended by Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988).

## STATEMENT OF THE CASE

### A. The Facts.

The basic facts are not in dispute. The Bonneville Power Administration ("BPA") is a federal power marketing agency empowered by Congress to construct, own, operate, and maintain a major federal electric transmission grid called the Federal Columbia River Transmission System to serve several important federal purposes.[6] Those purposes specifically include the integration and transmission of "electric power from existing or additional Federal or non-Federal generating units . . ." located both within and without the Pacific Northwest.[7] Pursuant to this congressional authority, in the early 1980s BPA constructed, and today BPA operates, maintains, and controls, the Montana Intertie, which is a federal 500-kV transmission line from a point near Townsend, Montana, to BPA's Garrison substation in Broadwater County, Montana.

The Montana Intertie was constructed in part to integrate the power from Colstrip Units 3 and 4, two coal-fired steam electric generating plants located in the coal-rich region of southeastern Montana. Pursuant to congressional authorization, petitioners contracted for BPA to transmit the power from transmission facilities connecting the new Colstrip plants over the Montana Intertie to their service areas to the west, predominantly in Washington and Oregon. The contractual arrangements for such transmission services are in two parts. BPA's transmission services over the Montana Intertie are governed by the Montana Intertie Agreement, Plaintiffs' Ex. 14. BPA transmission services west of the Garrison substation over BPA's "main grid" – undifferentiated BPA transmission facilities of 230 kV and higher – are pursuant to separate contracts with each of the five petitioners. None of the five petitioners has any right to own, operate, maintain, possess, use, or even have physical access to the transmission facilities for which petitioners have been taxed by the State of Montana.

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[6] *See* Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839 (1982) ("Regional Act"); Bonneville Project Act, 16 U.S.C. § 832 (1982); Pacific Northwest Federal Transmission System Act, 16 U.S.C. § 838 (1982).

[7] 16 U.S.C. § 838b (1982).

BPA has paid and will pay Montana for governmental services provided. Pursuant to Section 7(m) of the Regional Act, 16 U.S.C. § 839e(m) (1982), BPA has made "impact-aid" payments to the taxing districts along the corridor of the Montana Intertie. These payments, which by time of trial totalled $156,055, Tr. 522 (Eskridge), were intended to compensate and in fact have compensated those taxing districts for all identifiable economic impacts associated with the construction and continued operation of the Montana Intertie. Notwithstanding these federal payments, the Montana Department of Revenue and the defendant counties have imposed "beneficial-use" taxes upon the five petitioners herein on account of BPA's Montana Intertie.

**B. The Proceedings in State District Court.**

The Montana Department of Revenue ("Department of Revenue" or "Department") notified petitioners that it was taxing them for their alleged use of the Montana Intertie. Petitioners challenged that action by filing a lawsuit in the Montana District Court for Lewis and Clark County in Helena. The complaint raised three fundamental federal constitutional issues – that the Department's imposition of beneficial-use taxes violated the Supremacy Clause,[8] the Commerce Clause,[9] and the fourteenth amendment. In a non-jury trial, seven witnesses testified in person, and a number of depositions were entered into the record. In addition, numerous documents, transcripts, and exhibits were admitted. On December 21, 1987, the District Court issued an order upholding the taxes. *See* Appendix.

**C. The Montana Supreme Court Decision.**

Petitioners timely appealed to the Montana Supreme Court which affirmed. *See* Appendix. A petition for rehearing was timely filed, which was denied on June 1, 1989.

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[8]Article VI, clause 2 of the United States Constitution.

[9]Article I, section 8, clause 3 of the United States Constitution.

## REASONS FOR GRANTING THE WRIT

The record below establishes that Montana's imposition of beneficial-use property taxes upon petitioners violates the Commerce Clause, the Supremacy Clause, and the fourteenth amendment. Unless the writ is granted, these significant issues of federal constitutional law will not receive the fair and impartial consideration necessary to establish the constitutional violations asserted.

### A. The Commerce Clause: Montana's Tax on the Montana Intertie Discriminates Against Interstate Commerce in Electricity.

State legislation that imposes disproportionate burdens on interstate commerce is routinely stricken down even in the absence of federal legislation. *See New Energy Co. of Indiana v. Limbach*, 108 S. Ct. 1803 (1988) (negative aspect of Commerce Clause prohibits economic protectionism). The criteria for evaluating whether a state tax will be invalidated on Commerce Clause grounds are set forth in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) *("Brady")*. In order to withstand a Commerce Clause challenge, the state tax must meet each of *Brady*'s four separate elements or tests. Specifically, the tax must be (1) imposed upon an activity that has a "substantial nexus" with the taxing state,[10] (2) be apportioned fairly among states,[11] (3) not discriminate against interstate commerce, and (4) bear a fair relation to the services provided by the state. *Id.* at 279.

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[10]The nexus requirement is problematic, for the property subject to the tax — the Montana Intertie — is neither operated, possessed, controlled, or used by petitioners. Indeed, four of the five petitioners herein conduct no business operations whatsoever within the defendant taxing districts; their sole contact with the defendant counties is that their power is transmitted by BPA over the Montana Intertie pursuant to a contract between petitioners and BPA. And BPA simply cannot provide *Brady*'s required nexus between BPA's property and the Montana Intertie, for BPA's impact-aid payments to the defendant counties eliminate any justification for basing the assessments on BPA's presence in the counties.

[11]Because "fair apportionment" most often arises in goods-in-transit situations, it is not analyzed here.

According to *Brady*, discrimination against interstate commerce is an independent Commerce Clause test.[12] The record establishes that the challenged beneficial-use taxes on the Montana Intertie were intentionally designed to impose, and have in fact imposed, disproportionate economic burdens upon citizens of states outside of Montana.

The Montana statutory tax scheme was purposefully designed to impose disproportionate economic burdens on interstate commerce. The beneficial-use tax is restricted to federal transmission facilities of 500 kV and above – the interstate freeways for electric power.[13] The 1983 amendment to Mont. Code Ann. § 15-24-1203 provides:

> The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax.

Ch. 683, Montana Laws 1983. This restriction has the effect of imposing Montana's tax burden on those who wish to transmit large amounts of power over long distances. The effect of the tax is to export enormous amounts of taxes to citizens of other states, a result which the sponsors of the 1983 amendment specifically recognized.[14]

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[12]When a claim of discrimination is raised, the judiciary must conduct a thorough, searching inquiry into "the whole tax structure of the state." *Washington v. United States*, 460 U.S. 536, 542 (1983) (quoting *Tradesmens National Bank v. Oklahoma Tax Comm'n*, 309 U.S. 560, 568 (1940)). For obvious reasons the Montana Supreme Court had no inclination to conduct a searching investigation into Montana's tax structure. As a result, this Court is the only independent tribunal available to petitioners where the required searching inquiry can occur. For this reason alone the requested writ should issue.

[13]It is impossible to specify which generating unit's power is going over a specific line to serve a particular customer or customers. Tr. 41-46 (Porter). Moreover, transmission lines are bidirectional, *i.e.*, they can be used to transmit power in either direction. Tr. 64 (Porter). Thus, the Montana Intertie may carry power from east to west one day, and from west to east on the next.

[14]The primary sponsor of the 1983 amendment, Representative Marks, stated that, "If the privilege tax [on BPA 500-kV transmission facilities] is applied, a large amount of the tax would be picked up by consumers outside of the State of Montana." Minutes of Montana House Taxation Committee at 4 (Mar. 1, 1983). In the Senate, Senator Towe noted the obvious – that the vast majority of the taxes (by his calculation, about 85 percent) would be exported to other states. Minutes of Montana Senate Taxation Committee at 2 (Mar. 25, 1983).

The record contains abundant support for the conclusion that 500-kV transmission facilities are the arteries of interstate commerce in power. Mr. Dennis Porter, BPA's transmission engineering expert, testified that high-voltage transmission lines – those of 230 kV and over – are employed to transmit power over long distances, while lower voltage lines generally are used for shorter-distance transmission and local distribution purposes. Mr. Porter also testified that the highest capacity alternating-current lines in service in the western United States are 500 kV; those lines are capable of transmitting approximately 4.7 times the power 230-kV lines can transmit. Tr. 57 (Porter). Thus the text of the statute itself requires that the tax on federal transmission facilities be imposed in a manner that discriminates against interstate commerce.

Other elements of Montana's property tax structure exhibit both the intention and the result that property taxes be shifted to out-of-state consumers of goods and services. For example, the Montana Legislature has gone to extraordinary lengths to shield Montana rural electric cooperatives ("REAs") from taxes that might be imposed on account of federal transmission facilities. First, before it amended Mont. Code Ann. § 15-24-1203 to target federal transmission facilities of 500 kV and over, the Montana Legislature in 1981 enacted Ch. 478, Montana Laws 1981, in hopes that Congress might authorize state taxation of federal transmission facilities. In order to protect parochial interests, the legislation exempted REAs from any possible imposition of taxes consequent to such congressional action.[15] The same 1981 Montana legislation modified the definition of "class eleven" property contained in Mont. Code Ann. § 15-6-141(a) to encompass federal transmission property used to transmit power from a

[15]Specifically, Mont. Code Ann. § 15-6-201(a) was amended to exempt the property of

> the United States, the state, counties, cities, towns, school districts, except, if congress passes legislation that allows the state to tax property owned by an agency created by congress to transmit or distribute electrical energy, the property constructed, owned, or operated by a public agency created by congress to transmit or distribute electric energy produced at privately owned generating facilities (not including rural electric cooperatives).

privately owned generating station, but again explicitly exempted REAs from the scope of that amendment.[16] Representative Brand, who sponsored the 1981 amendments, made his discriminatory intent manifest; the official minutes of the Montana House Taxation Committee note that he was "hopeful this bill won't tax the co-op [REA] lines." Montana House Taxation Committee Minutes at 3 (Jan. 21, 1981). Moreover, when the 1983 Montana Legislature decided to restrict the scope of beneficial-use taxes on federal facilities to those of 500 kV and over, a primary justification for this voltage limitation was to protect Montana REAs. As the measure's primary sponsor, Representative Marks, warned, "If you got below 500-kV [lines] . . . you could include smaller lines *and REAs*." Minutes of Montana Senate Taxation Committee at 2 (Mar. 25, 1983) (emphasis added). Finally, the Montana Legislature has required that, in order for property to be taxable to REAs as class four property, such property must be "used *and owned by* cooperative rural electrical . . . . associations organized under the laws of Montana. . . ." Mont. Code Ann. § 15-6-135 (1) (a) (emphasis added). Of course, petitioners have been taxed notwithstanding that they do not own the Montana Intertie. Each of these legislative machinations establishes a clear intent to export taxes on federal transmission lines unjustifiably to other states.

The Montana tax classification scheme demonstrates an intent to discriminate against interstate commerce in electricity. Montana "classifies" property into various categories, and applies different tax rates to each category. For electric utilities, there are basically two types or classes of property: Property owned or "used" by investor-owned utilites such as petitioners, and property owned by Montana REAs. While the operations of Montana REAs are restricted to intrastate activities — the distribution of power to rural areas and communities in the state — the

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[16]The definition, with the 1981 amendment in italics, is as follows:

> (a) centrally assessed electric power companies' allocations, *including, if congress passes legislation that allows the state to tax property owned by an agency created by congress to transmit or distribute electrical energy, allocations of properties constructed, owned, or operated by a public agency created by the congress to transmit or distribute electric energy produced at privately owned generating facilities (not including rural electric cooperatives).*

operations of petitioners are predominantly interstate in character.[17] Montana REA property is taxed at a rate one-fourth the rate imposed upon petitioners' property, *viz.*, three percent of true cash value as opposed to twelve percent of true cash value. Mont. Code Ann. §§ 15-6-135, 15-6-141 (1987). Thus, Montana REA customers pay only one-fourth the property taxes petitioners' interstate electric customers would pay upon an *identical* piece of property.

Another example of legislative intent to discriminate against interstate commerce occurred in 1987, when the Montana Legislature last amended the beneficial-use statute.[18] That amendment exempts persons or entities who use state-owned railroad tracks and rights-of-way so long as such persons or entities use the property exclusively for railroad purposes. Because the Montana Legislature has provided no similar exemption for users of federally owned property, the beneficial-use statute runs afoul of this Court's recent decision affirming *United States v. Manassas, Virginia*, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 108 S. Ct. 1568 (1988). Because the beneficial-use tax statute treats those who contract with the federal government worse than those who contract with the state, Montana's imposition of taxes on the alleged "users" of the Montana Intertie should be struck down.

In summary, the Montana statutory scheme is infected with numerous provisions that reflect a clear intent to discriminate against both interstate commerce and those with whom the federal government deals. The Montana Legislature very recently reinforced this intent by exempting state-owned railroad property from taxation, even though such taxpayers (unlike petitioners) may have exclusive use, possession, and control of the tax-exempt property. For each of these four reasons, the Montana statutory scheme regarding implementation of beneficial-use taxes is unconstitutional on its face.

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[17]Portland General Electric Company, Puget Sound Power & Light Company, and The Washington Water Power Company derive virtually no revenues from Montana retail consumers of electric power, and Pacific Power & Light Company serves only a handful of customers in northwest Montana.

[18]Ch. 591, Montana Laws 1987.

Montana's beneficial-use tax laws also have been administered in a fashion that discriminates against interstate commerce. First, although the Department has admitted in writing that Montana REAs do in fact "use" federal high-voltage transmission facilities in Montana, Department Brief to Montana Supreme Court at 33-34 (Nov. 10, 1988), it has studiously avoided even investigating whether REAs should pay benefical-use taxes. Tr. 918-19 (Whittinghill). Nothing in the text of Mont. Code Ann. § 15-24-1203 (1987), limits the scope of the statute for 500-kV transmission-line taxes to investor-owned utilities; nonetheless, the Department has targeted *only* such utilities — to the exclusion of Montana REAs.

The Department's failure even to investigate REA "use" of federal transmission facilities is all the more egregious, for it is manifest that the REAs derive benefits from high-voltage transmission facilities in the state. For example, Mr. Porter of BPA stated that power delivered to Montana REA preference customers is scheduled across the entire BPA system, which of course includes the 500-kV facilities in northwest Montana located between the Idaho border and BPA's Hot Springs substation. Tr. 190-91. And BPA's Montana representative, George Eskridge, testified that power from the federal Columbia River power system would come over a variety of paths, including the Idaho border-Hot Springs 500-kV system. Tr. 491.

Not only does Montana's beneficial-use tax discriminate against interstate commerce, its imposition bears no fair relation to the services provided by the state, as is required by *Brady*. There is no such relationship in the present case because any services provided by the taxing districts are provided not to petitioners but, rather, to BPA. Moreover, under the "impact aid" provision of the Regional Act, the taxing authorities have *already* been compensated for *all* past substantial impacts occasioned by the construction and continued existence of the Montana Intertie,[19] and will be compensated for any future identifiable impacts. These two circumstances completely override any applicability that *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), might otherwise have.

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[19]Indeed, BPA's George Eskridge testified that BPA had already paid the three defendant counties in which the Montana Intertie is located over $150,000 in impact-aid payments. Tr. 522.

In sum, the Montana statutory scheme, as well as the Department's implementation of that scheme, violate the criteria established in *Brady*.

## B. The Supremacy Clause: Montana's Imposition of Beneficial-Use Taxes Is Preempted by the Impact-Aid Provision of the Regional Act, by the Anti-Discrimination Act, and by the Doctrine of Implied Preemption.

Petitioners' challenge involves two types of Supremacy Clause claims, one based upon implied preemption and the other upon statutory preemption. Montana's imposition of beneficial-use taxes is statutorily preempted because it is in conflict with two federal statutes, the impact-aid provision of the Regional Act[20] and the Anti-Discrimination Act.[21]

### 1. Express or Statutory Preemption: Both the Impact-Aid Provision of the Regional Act and the Anti-Discrimination Act Invalidate Montana's Imposition of Beneficial-Use Taxes.

#### a. The Impact Aid Provision of the Regional Act.

In Section 7(m) of the Regional Act, 16 U.S.C. § 839e(m) (1982), Congress authorized BPA to make "impact aid" payments to local governmental units affected by the construction and continued operation of new high-voltage federal transmission facilities. The obvious logic behind the impact-aid provision was to eliminate any possible basis for a claim that the Montana Intertie and similar facilities would not be "paying their way." Pursuant to the impact-aid provision, the three defendant counties in which the Montana Intertie is located applied for, received, and presumably have spent the $156,055 in payments from BPA on account of the Montana Intertie. Tr. 522 (Eskridge). Federal and Montana State legislative history indicates that the impact-aid provision was enacted as a specific response to Montana's assertion that local taxing districts along the Montana Intertie deserved compensation.

The federal legislative history establishes that the impact-aid provision was written into the Regional Act at the last minute. It appears that initially some thought had been given to a

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[20] 16 U.S.C. § 839e(m) (1982).

[21] 15 U.S.C. § 391 (1982).

provision that would have been a payment in lieu of taxes, *see* 126 *Cong. Rec.* 10,685 (daily ed. Nov. 17, 1980) (remarks of Rep. Dingell), which approach normally requires ongoing congressional funding. That approach, however, was rejected in favor of a BPA-funded, more targeted plan that would compensate the local taxing districts for all economic impacts occasioned by providing governmental services in response to the construction and operation of new high-voltage federal transmission facilities. *Id.* Congress was particularly careful to note that any such payments not be an obligation of the United States; instead, BPA was authorized to use its own funds derived from its power operations to satisfy the taxing districts. *See* 48 *Fed. Reg.* 55763 (Dec. 15, 1983).

Montana legislative materials provide additional information regarding the development of the impact-aid provision. After enactment of the Regional Act in 1980, Montana's Congressman Williams apparently reported back to the Montana Legislature regarding his efforts to seek federal authorization for a tax upon new federal transmission facilities such as the Montana Intertie. *See* Minutes of Montana House Taxation Committee at 3 (Jan. 21, 1981). Representative Williams noted that he had sought, but had not been able to secure, passage of a provision that would have required payment of full property taxes upon such facilities. *Id.* His recommendation to the 1981 Montana Legislature was that it enact legislation that would permit imposition of state property taxes upon federal facilities in the event Congress in the future could be persuaded to authorize such state taxation of federal facilities. *Id.* The legislative materials state, "Rep. Williams pointed out that this bill [Ch. 478, Montana Laws 1981] would be unenforceable unless Congress backed it up." *Id.* at 4.[22]

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[22]Congressman Williams' position – that Congress must authorize taxation of federal facilities – was well founded. In *Mayo v. United States*, 319 U.S. 441 (1943), the Court upheld an injunction against a state's enforcement of a statute imposing fees upon a commodity owned by the United States. The Court stated,

> But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom [from taxation] continues.

*Id.* at 448.

Finally, after passage of the Regional Act, BPA set about implementing its authority and, on December 15, 1983, published a notice of opportunity for public comment. In that notice, BPA asserted that

> The intent [of the impact-aid policy] is to pay for a qualifying local government's cost of services concerning a BPA major transmission facility located within the government's boundaries. . . . Services covered are all those reasonably related to the facility and the personnel associated with it, and include fire protection, police protection, facility planning services, emergency services, road maintenance, school services, etc. . . .

48 *Fed. Reg.* 55764 (Dec. 15, 1983). Shortly after the final revised impact-aid policy was adopted, the defendant counties in which the Montana Intertie is located requested and received $156,055 in impact-aid payments. Tr. 522 (Eskridge).

Property taxes are frequently justified on the grounds that they are the price of living in an ordered society. In this instance, however, Congress has provided a specific vehicle whereby the defendant counties have been fully reimbursed for all economic impacts consequent to the construction and operation of the Montana Intertie. Obviously, had Congress (including Montana's Congressman Williams) contemplated that the state could impose beneficial-use taxes upon petitioners on account of the Montana Intertie, the impact-aid provision would not have been enacted. Enactment of Section 7 (m) of the Regional Act signals a clear congressional understanding that Montana may *not* impose taxes on the Intertie and, accordingly, Montana's imposition of beneficial-use taxes on account of those transmission facilities is preempted.

**b. Anti-Discrimination Act.**

A second federal statute, Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (1982) ("Anti-Discrimination Act"), preempts Montana's imposition of beneficial-use taxes. The Anti-Discrimination Act provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates

> against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

15 U.S.C. § 391.

While general discrimination against interstate commerce is the focus of the Commerce Clause portion of this petition, *supra*, it is important here to note that any discrimination against interstate commerce in electricity, however indirect, is prohibited by the Anti-Discrimination Act. Congress obviously believed that protecting interstate generation and transmission of electricity from the burdens of discriminatory state taxes was of such a high priority that something more than the generic protections of the Commerce Clause itself was needed. Accordingly, the Anti-Discrimination Act was promulgated. The conclusion is similarly inescapable that Congress intended that the Anti-Discrimination Act afford the interstate generation and transmission of electricity greater protection against discriminatory state taxes than the Commerce Clause alone. Thus, scrutiny under the Anti-Discrimination Act must be even more stringent than under *Brady*.

*Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979), illustrates the broad scope of the protection under the Anti-Discrimination Act. There, the unanimous Court invalidated a New Mexico tax upon the privilege of generating electricity within the state because out-of-state electricity users bore a greater burden than in-state users. The Court held, "Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute." *Id.* at 150 (emphasis in original; footnote omitted).[23] By the same token, because the tax on 500-kV facilities *itself* necessarily discriminates against electricity sold outside of Montana, the tax violates the federal statute.

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[23]The Nevada Supreme Court also relied upon the Anti-Discrimination Act in declaring invalid a Nevada tax upon power generated at Hoover Dam. *State v. Burbank*, 100 Nev. 598, 691 P.2d 845 (1984).

### 2. The Doctrine of Implied Preemption Invalidates Montana's Beneficial-Use Taxes.

The federal government provides a vast array of services to the public. As but one example, the United States has invested virtually billions of dollars in facilities used for the generation and transmission of electric power consumed by private citizens. The vast hydroelectric developments on the nation's waterways, as well as the Tennessee Valley Authority's gigantic thermal generating units, generate enormous amounts of power that are ultimately consumed by industrial, commercial, and residential consumers. If Montana's tax on the BPA's Montana Intertie is allowed to stand, nothing would prevent a state from taxing a private person for his alleged use of federal power generating facilities, federal postal facilities used to deliver the mail, or other federal property. Montana's imposition of beneficial-use taxes is utterly unprecedented.

The Supremacy Clause prohibits Montana's taxation of the Montana Intertie. In *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall anticipated the harm that would flow from Montana's experiment:

> If the States may tax one instrument, employed by the govenment in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.
>
> . . . The question is, in truth, a question of supremacy; and *if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.*

17 U.S. at 432-33 (emphasis added). Thus developed the bright-line distinction: Instrumentalities possessed by the federal government are not subject to state taxation.

Under *M'Culloch*, states may tax federal property if it is possessed by private taxpayers. *Baltimore Shipbuilding and Dry Dock Co. v. Baltimore*, 195 U.S. 375 (1904). But taxation in the absence of possession has never been allowed. *United States v. Allegheny County, Pa.*, 322 U.S. 174 (1944) *("Allegheny")* (federal possessions not subject to state tax). In 1958, this Court developed the *Allegheny* rationale. In *United States v. Detroit*, 355 U.S. 466 (1958), this Court upheld a tax upon a lessee of federal property who had both possession and physical use of the federal property. *Id.* at 470. And in *United States v. Muskegon*, 355 U.S. 484 (1958), a state tax upon a permittee who was in actual possession of a manufacturing plant owned by the United States was upheld. *Detroit v. Murray Corp.*, 355 U.S. 489 (1958), further developed the requirement of a possessory interest under the *M'Culloch* line of cases:

> We see no essential difference so far as constitutional tax immunity is concerned between taxing a person *for using property he possesses* and taxing him *for possessing property he uses* when in both instances he uses the property for his own private ends. Nor have we been pointed to anything else which would bar a State from taxing possession in such circumstances. *Lawful possession of property is a valuable right when the possessor can use it for his own personal benefit.*

*Id.* at 493 (citation omitted; emphasis added).

*United States v. County of Fresno*, 429 U.S. 452 (1977) *("Fresno")*, is the most recent significant decision in the *M'Culloch* line of cases. That dispute arose after a California county had imposed an annual tax on private taxpayers' possessory leasehold interests in government-supplied housing. This Court based its opinion on *McCulloch's* first principles, *viz.*, that federal functions and interest not be discriminated against. To determine the validity of the tax, this Court looked to three factors: (1) its legal incidence, (2) whether it was applied in a discriminatory manner, and (3) whether it was based on the total value of the federal interest or only the value of the taxpayers' possessory interest in the property. Here, all three tests are met:

The incidence is in part on BPA because of the "exchange" provision of the Regional Act, Tr. 443-44 (Hammerquist), the discriminatory manner of the tax has already been demonstrated, and the petitioners had no possessory interest whatsoever in the Montana Intertie. Thus *Fresno* by itself invalidates the challenged tax.

Lower federal courts have interpreted the *M'Culloch* line of cases to preclude taxation of federal property in analogous situations. Most recently, the Sixth Circuit affirmed a federal district court's determination that a state could not impose property taxes on a contractor who operates and maintains federal munitions facilities. *United States v. Hawkins County, Tenn.*, 859 F.2d 20 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1638 (1989). And only last year, in *United States v. Jackson County, Mo.*, 696 F. Supp. 479 (W.D. Mo. 1988), the federal district court held that Bendix, which had agreed with the United States government to manage, operate, and maintain a federal munitions facility, could not be taxed for similar alleged use of those facilities. In reaching this holding, the court discussed this Court's 1958 beneficial-use cases, as well as *Fresno*, and concluded that because Bendix lacked exclusive possession of the facilities the tax could not validly be imposed under Missouri law.

### C. The Fourteenth Amendment: Montana's Imposition of Beneficial-Use Taxes on Federal High-Voltage Transmission Facilities Violates the Due Process and Equal Protection Clauses.

Both the Due Process Clause and the Equal Protection Clause of the fourteenth amendment apply to this controversy. This fourteenth amendment challenge in some aspects parallels the Commerce Clause challenge and, thus, the facts in the record alluded to in the Commerce Clause portion of this petition are equally applicable here.

Under the Due Process Clause, there is an insufficient nexus between petitioners and the Montana Intertie to allow imposition of the challenged taxes. As this Court stated, the question is

> whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

*Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940). *See also Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968) (invalidation of taxes that were not related closely to the value of the property interest being taxed). Of particular significance here is the fact that petitioners have absolutely no right of access to any portion of the property being taxed. In sum, there is simply not sufficient nexus between petitioners and BPA's Montana Intertie to justify the Department's imposition of taxes.

The Equal Protection challenge is based upon the Department's refusal even to consider treating taxpayers similarly situated equally. Unequal administration of tax laws has long been a basis for invoking the Equal Protection Clause. *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907). The Department's utter failure even to investigate whether Mont. Code Ann. § 15-24-1203 should be imposed upon Montana REAs' use of transmission facilities employed by BPA to deliver power to the cooperatives is perhaps the most flagrant example possible of both discriminatory intentions and consequences.

Finally, the Department of Revenue has inflicted an unequal burden. In the long history of the Department's administration of Mont. Code Ann. § 15-24-1203 the Department has always required physical possession of the otherwise tax-exempt facilities coupled with exclusive use of the property in order to trigger tax liability. Tr. 766-88 (Groepper). In the instant situation, the Department has required *neither*. Accordingly, the Department's conduct violates the Equal Protection Clause of the fourteenth amendment.

## D. Conclusion

For the reasons stated above, a writ of certiorari should issue to the Montana Supreme Court.

Respectfully submitted,

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